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1975
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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 74-5806

JOHN NEWMAN
Petitioner

Versus

C. MURRAY HENDERSON WARDEN OF
LOUISIANA STATE PENITENTIARY
Respondent

On Application For A Writ Of Certiorari To
The United States Court Of Appeals For The
Fifth Circuit

RESPONSE OF STATE OF LOUISIANA

STATEMENT OF THE CASE

In 1962 John Newman, petitioner herein, was indicted for aggravated rape by the Orleans Parish Grand Jury. In 1964 Newman was tried in the Criminal District Court for the Parish of Orleans, found guilty, and sentenced to life imprisonment. At no time either prior to or during his trial did Newman challenge the method of jury selection in Orleans Parish, thus waiving the issue under the then existing procedural statute, La. R.S. 15:202, as interpreted by the Louisiana Supreme Court in State v. Wilson,

204, La. 24, 14 So.2d 873 (1943), and State v. Chianelli, 226 La. 552, 76 So.2d 727 (1954), to the effect that in Louisiana an attack on the grand jury must be made before the end of the third day after the expiration of the grand jury's term, or before trial, whichever is earlier; that an objection to a petit jury must be filed some time prior to trial, and that if the issue is not timely raised it is waived. See Michel v. Louisiana, 350 U.S. 91 (1955).[1/]

Newman did not appeal his conviction to the Louisiana Supreme Court. However, six years later he filed a Petition For Writ Of Habeas Corpus in the Criminal District Court for the Parish of Orleans alleging that the grand and petit juries involved in his case had been selected in a fashion which discriminated against the black race, of which he is a member.

In view of the prevailing federal jurisprudence in 1970 dealing with the subject of waiver (see Fay v. Noia, 372 U.S. 391 (1963); Labat v. Bennett, 365 F.2d 698 (5th Cir. 1958)) there was no basis for the State of Louisiana to urge that Newman's belated post-conviction attack on the grand and petit juries in his case had been waived because not timely raised in the trial court. Therefore, the State of Louisiana went to the merits of

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1/ Under Article 535 of the present Louisiana Code of Criminal Procedure, adopted in 1966, challenge to the general jury venire, the grand jury venire, the grand jury, the petit jury venire, or the petit jury must be filed at least three judicial days before the beginning of the trial, and may with the permission of the court be filed at any time before the trial starts. See Jones v. Henderson, 494 F.2d 47 (5th Cir. 1974).

the matter and contended that in 1962 there was no discrimination against blacks in the selection of juries in Orleans Parish, citing State v. Barksdale, 247 La. 198, 170 So.2d 374 (1964), cert. denied 382 U.S. 921 (1971), in which the Supreme Court of Louisiana held that since 1958, when this Court handed down its decision in Eubanks v. Louisiana, 356 U.S. 584, and as a result the method of jury selection in Orleans Parish was drastically changed, there had been no discrimination against blacks in the selection of juries in Orleans Parish. Newman's Petition For Writ Of Habeas Corpus was denied by the Criminal District Court for the Parish of Orleans.

Thereafter, in 1971, Newman filed his Petition For Writ Of Habeas Corpus in the United States District Court for the Eastern District of Louisiana. The matter was referred to a United States Magistrate, who conducted an evidentiary hearing and recommended that relief be granted.[2/] Here again, in 1971 the State of Louisiana had no possible basis in the federal jurisprudence to urge waiver for failure to timely raise the question of discriminatory jury selection in the Louisiana trial courts, and consequently opposed the petition on its merits.[3/]

2/ Wingo v. Wedding, U.S. , 94 S.Ct. 2842 (1974), of course, held that a United States Magistrate had no jurisdiction to conduct such an evidentiary hearing.

3/ Louisiana did at this time, however, object to an evidentiary hearing in the United States District Court on the ground that in State v. Barksdale, supra, and its companion cases the Louisiana courts had thoroughly investigated the method of jury selection in Orleans Parish since 1958 and had found no discrimination against blacks, and that under the provisions of 28 U.S.C. 2253 the finding of the Louisiana courts must be presumed to be correct unless the federal court, on a consideration of the Louisiana records, should conclude that the factual determination of the Louisiana courts was not fairly supported by the Louisiana records.

Following the United States Magistrate's report, this Court on April 17, 1973, handed down its decision in Davis v. United States, 411 U.S. 233, holding that a federal prisoner who had failed to timely challenge the jury selection at the time of his trial under Rule 12 (b)(2) of the Federal Rules of Criminal Procedure had waived his right to do so later in a post-conviction proceeding. Thereafter, when the United States District Court Judge adopted the Magistrate's report and granted Newman's Petition For Habeas Corpus, the State of Louisiana appealed to the Fifth Circuit Court of Appeals and urged waiver under Davis. The Fifth Circuit reaffirmed its earlier holding in Jones v. Henderson, 494 F.2d 47 (1974), and dismissed Newman's petition, holding that the Louisiana waiver provision must be given effect by the federal courts unless there is a showing of actual prejudice. Newman v. Henderson, 496 F.2d 896 (5th Cir. 1974).

ARGUMENT

1.

The Fifth Circuit Acted Properly In Permitting Louisiana To Urge Waiver For The First Time On Appeal

The State of Louisiana respectfully submits that the only reason it did not urge waiver in the Louisiana Courts and in the United States District Court in the instant case, and instead defended the jury attack on its merits, was because until this Court handed down its decision in United States v. Davis,

supra, in April of 1973 there was absolutely no legal basis for the State of Louisiana to urge waiver in post-conviction proceedings challenging the selection of the petitioner's juries on racial grounds.

For this reason, it is frivolous for counsel for Newman to contend in this Court that "the state courts professed themselves willing to forego their interest in finaltiy if a constitutional defect existed". Petition, p. 8. Struggling as it continually is to maintain reasonably current criminal dockets, the State of Louisiana is never willing to forego its interest in finality for purely technical questions such as the one herein being urged. In fact, this Court can take judicial notice of the fact that the State of Louisiana has on many occasions asked this Court to reestablish the principle of finality in criminal proceedings. Certainly the State of Louisiana does not want to waste valuable time and energy at the present time delving into the composition of juries which many years ago indicted or tried men who did not at the time of their trial take the trouble to challenge the current method of jury selection.

2.

The Waiver Principle Of Davis Should Apply Equally To The Several States

In Davis v. United States, 411 U.S. 233 (1973), the accused, a black man, went to trial without objecting to the composition of the grand jury which indicted him, an issue which

under Rule 12 (b)(2) of the Federal Rules of Criminal Procedure must be raised by motion prior to trial. Approximately three years after his conviction Davis filed a motion to dismiss the indictment pursuant to 28 U.S.C. 2255, alleging that qualified Negro jurymen had been systematically excluded from the grand jury which indicted him, and that his collateral attack on his conviction could be precluded only after a hearing in which it was established that he deliberately bypassed or understandingly and knowingly waived his claim of unconstitutional grand jury composition, relying, inter alia, on Fay v. Noia, 372 U.S. 391 (1963), and Kaufman v. United States, 394 U.S. 217 (1969). In holding that Davis had waived his right to challenge the composition of his grand jury this Court said: (at 411 U.S. 241-242)

> "The waiver provisions of Rule 12(b)(2) are operative only with respect to claims of defects in the institution of criminal proceedings. If its time limits are followed, inquiry into an alleged defect may be concluded and, if necessary, cured before the court, the witnesses, and the parties have gone to the burden and expense of a trial. If defendants were allowed to flout its time limitations, on the other hand, there would be little incentive to comply with its terms when a successful attack might simply result in a new indictment prior to trial. Strong tactical considerations would militate in favor

of delaying the raising of the claim in hopes of an acquittal, with the thought that if those hopes did not materialize, the claim could be used to upset an otherwise valid conviction at a time when reprosecution might well be difficult.

" * * *

"We think it inconceivable that Congress, having in the criminal proceeding foreclosed the raising of a claim such as this after the commencement of trial in the absence of a showing of 'cause' for relief from waiver, nonetheless intended to perversely negate the Rule's purpose by permitting an entirely different but much more liberal requirement of waiver in federal habeas proceedings. We believe that the necessary effect of the congressional adoption of Rule 12(b)(2) is to provide that a claim once waived pursuant to that Rule may not later be resurrected, either in the criminal proceedings or in federal habeas, in the absence of the showing of 'cause' which that Rule requires. We therefore hold that the waiver standard expressed in Rule 12 (b)(2) governs an untimely claim of grand jury discrimination, not only during the criminal proceeding, but also later on collateral review."

The State of Louisiana respectfully submits that the reasoning of Davis applies equally well to state criminal proceedings. At the time of Newman's trial in 1964 La. R.S. 15:202 (as interpreted in State v. Wilson and State v. Chianelli, supra) provided that in Louisiana criminal proceedings an attack on a grand jury must be made before the end of the third day after the expiration of the grand jury's term, or before trial, whichever was earlier; and that a challenge to the petit jury must be filed some time prior to trial, "otherwise, all such objections shall be considered as waived and shall not afterwards be urged or heard." See Michel v. Louisiana, supra, in which this Court held that the waiver provisions of La. R.S. 15:202 did not violate the Fourteenth Amendment.

Surely this Court will not apply a stricter rule to the several states than it does to the federal government. The waiver standard expressed in La. R.S. 15:202 should govern an untimely claim of jury discrimination not only during the Louisiana criminal proceeding, but also later on federal collateral review. The rule of Davis should in all fairness be available to the several states.

CONCLUSION

The State of Louisiana respectfully asks this Honorable Court to deny Newman's Petition For A Writ Of Certiorari

to the United States Court of Appeals for the Fifth Circuit.

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